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In The

Supreme Court of the United States

October Term, 1997

OHIO FORESTRY ASSOCIATION, INC.,
Petitioner,

v.

SIERRA CLUB, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR AMICUS CURIAE SOUTHEASTERN OHIO OIL & GAS ASSOCIATION IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Amicus will address the following question:

Assuming *arguendo* that the Wayne National Forest Land Resource Management Plan ("Wayne Forest Plan") is unlawful, what is the effect on non-timber interests?

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INTEREST OF AMICUS CURIAE[1]

Southeastern Ohio Oil & Gas Association ("SOOGA") is an industry group representing independent small oil and gas producers in southeastern Ohio. Its purpose is to protect, promote, foster and advance the common interests of those engaged in the oil and gas industry. SOOGA has 151

[1]Pursuant to Supreme Court Rule 37.6, amicus hereby indicates that no counsel for a party in this case authored this amicus brief in whole or in part.

members, most of whom are oil and gas producers, but some of whom are engaged in allied industries.

Pursuant to U.S. Supreme Court Rule of Procedure 37.1, SOOGA believes that there is a dimension to the review of the Sixth Circuit opinion which no other party or *amicus curiae* will bring to the attention of the Court--namely, the effect of the Sixth Circuit opinion on the leasing of lands in the Wayne National Forest for the production of oil and gas.

STATEMENT OF THE CASE

In the interest of brevity, amicus curiae is omitting any detailed statement of the facts. Instead, it adopts by reference the Statement of the Case contained in Petitioner's Brief, but supplements the Statement with the following additional facts.

The Second Amended Complaint for Declaratory and Injunctive Relief requested: "that the Court declare that the plan adopted by the Defendants is unlawful...". Joint Appendix ("Jt. App."), p. 26.

The Sixth Circuit opinion concluded at Pet. App. A, p. 8a:

> [i]n light of our examination of the structure, legislative history, and purpose of the National Forest Management Act we find the Forest Service has failed to comply with the protective spirit of the National Forest Management Act. We further find that this noncompliance is an arbitrary act in excess of the statutory limitations provided in Section 1604(g)(3)(F)(v). The Forest Service's planning process, therefore, was not in accordance with the law. Accordingly, we REVERSE the district court's order for summary judgment and REMAND this case to the district court for further proceedings consistent with this opinion.

Upon remand, the Sierra Club moved for summary judgment and sought and obtained a temporary restraining order and injunction prohibiting any timbering in the Wayne National Forest.

The Sixth Circuit opinion is unclear regarding the remedy to be afforded to the Sierra Club. District Judge James L. Graham took an expansive view of the Sixth Circuit opinion and indicated at the hearing on the temporary restraining order that the entire plan was being nullified. At pp. 15-17 of the Transcript of the Proceedings held on September 5, 1997,[2] Judge Graham said:

> I understand that the two operations that are the subject of the present motion do not involve clear-cutting, but it seems quite clear to me that the decision of the Sixth Circuit in this case goes far beyond the issue of clear-cutting. Indeed, it's my conclusion that the decision of the Sixth Circuit completely undermines the entire forest plan in this case.
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[2]Copies of the transcript were previously lodged with the Clerk of this Court by the Petitioner.

> It's my conclusion that the court of appeals has held that the forest service is incapable of conducting an unbiased and neutral evaluation of the various considerations necessary to prepare a forest plan under the National Forest Management Act. So it would appear that the entire forest plan in this case is implicated by the Sixth Circuit decision.

The Court granted Sierra Club's motion and enjoined any further timbering activities in the Wayne National Forest.[3]

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[3]The Sierra Club and Citizen's Council on Conservation and Environmental Control in their Second Amended Complaint for Declaratory and Injunctive Relief have hinted that oil and gas may be the subject of the next attack. In paragraphs 37 and 38 of the Complaint (Jt. App. at pp. 21–22), they allege:

> 37. In Southeast Ohio the use of land for urban and agricultural purposes has been accompanied by exploitation for purposes of mineral extraction and timbering. Large sections of land have been devoted to strip mining; oil and gas development has also expanded greatly in the past decade. Timber production has occurred on both public and private lands. Despite liberal use of the land in Southeast Ohio for these primary industries, the regional economy is among the worst in the State. Extraction and exploitation have not proven to be reliable sources of stable income or employment. Yet, in disregard of these facts, the defendants justify the below cost sale of timber, in part, as purportedly necessary for the local economy. The defendants know or should know that preservation of the timber base by limiting below cost timbering will better serve the local economy. The unique recreational opportunities offered by the Wayne's mature old growth forest will provide greater economic benefits to the local community.

SUMMARY OF ARGUMENT

The Sixth Circuit opinion potentially adversely affects not only timber interests, but mining interests, recreational interests, oil and gas interests, scientific interests, and the interest of any other party who had input in the development of the Wayne Forest Plan. This Court should not allow the judiciary to substitute its judgment for that of Congress. Congress has expressly vested discretion in the U.S. Forest Service to allocate the uses of national forests among competing interests.

In this case, the U.S. Forest Service consulted all affected parties in the formulation of the Wayne Forest Plan. After considering all public input, the U.S. Forest Service proposed and approved the Wayne Forest Plan, which provides for the multiple uses of the Wayne National Forest by timber interests, oil and gas interests, the recreational community, the scientific community, and so forth.

If this Court affirms the Sixth Circuit opinion, the ramifications will be felt not only by the timber industry, but

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> 38. The mineral exploitation in the area of the Wayne has already severely and adversely affected the water supply in the region. The clear–cutting under the plan and associated road building will cause increased water run–off during periods of heavy rains and result in increased sedimentation adversely affecting the watershed. The plan and its associated environmental impact study do not contain sufficient data or analysis concerning the plans' impact on water resources. Watershed protection is lacking in the plan as is sufficient discussion of whether there is any current technology which can mitigate the plans' effect on water resources.

by the oil and gas industry and others who have an interest in the Wayne Forest Plan.

ARGUMENT

For all of the reasons identified in the Brief for Petitioner and those set forth below, SOOGA urges the U.S. Supreme Court to reverse the decision of the Sixth Circuit.

The ramifications of the Sixth Circuit's ruling are far-reaching and will likely adversely affect non-timber interests, specifically including the leasing of land in the Wayne National Forest for oil and gas production.

SOOGA was a participant in the formulation of the Plan. The final plan contained provisions which accommodated the use of the Wayne National Forest by recreational groups, scientists, timbering interests, oil and gas interests and mining interests. Although the final plan adopted on January 4, 1988 provided for leasing of land for oil and gas development, only one lease sale involving 1,000 acres has occurred.[4] All other lease sales have been halted because of the *Sierra Club* litigation.

In 30 U.S.C. Section 226(b)(1)(A), the congressional purpose to provide for development of federal properties for oil and gas is implemented in pertinent part:

> ...Lease sales shall be held for each State where eligible lands are available at least quarterly and more

[4]The Wayne National Forest has approximately 180,000 acres of land.

> frequently if the Secretary of the Interior determines such sales are necessary. ...[5]

This congressional purpose, however, is subject to 30 U.S.C. Section 226(h):

> The Secretary of the Interior may not issue any lease on National Forest System Lands reserved from the public domain over the objection of the Secretary of Agriculture.

In implementing 30 U.S.C. Section 226(h), the Secretary of Agriculture has promulgated regulations covering oil and gas resource development in the national forests.[6] Pursuant to the regulations, "leasing analyses" must be in compliance with the National Environmental Policy Act of 1969 and/or the National Forest Management Act of 1976.[7] Upon completion of "leasing analyses" under the applicable regulations and in conformity to the Wayne Forest Plan,[8] the U.S. Forest Service then implements the Wayne Forest Plan with respect to oil and gas development by issuing a "leasing decision for specific lands".[9] The Forest

[5]The Bureau of Land Management within the Department of Interior actually conducts oil and gas lease sales. See 43 U.S.C. Section 1731.

[6]See 36 C.F.R. Section 228.100, et seq. and 36 C.F.R. Section 219.22.

[7]See 36 C.F.R. Section 228.102(c).

[8]See 36 C.F.R. Section 228.102(e)(1).

[9]See 36 C.F.R. Section 228.102(e).

Service finally refers the specific acreage proposed to be leased to the Bureau of Land Management, which has the right to conduct lease sales.[10]

If the Wayne Forest Plan is declared unlawful, the Bureau of Land Management will be barred from selling leases for the development of oil and gas in the Wayne National Forest. That will adversely affect the local oil and gas industry and, of course, the local economy. Moreover, the revenue sharing arrangements between the federal government and state and local governments will also be adversely impacted. Pursuant to 30 U.S.C. Section 191, revenues from the sale of oil and gas leases and royalties reserved by the United States under those leases are shared with state and local governments on a 50/50 basis.

If the ruling of the Sixth Circuit is affirmed, it is probable that there will be no further development of oil and gas production in the Wayne National Forest until another new Federal Land Management Plan is approved in conformity to law, a process which takes many years.

If there is no oil and gas lease activity, there are no proceeds of sale or royalties to share with state and local governments, and the property sits idle. Since the federal government pays no state taxes, there is no revenue from the lands to fund local education. Finally, the failure to allow the implementation of the January 4, 1988 Wayne Forest Plan deprives the local economy of the economic activity associated with oil and gas development, in the way of jobs, production, taxes and revenues.

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[10] Id.

CONCLUSION

For all the above reasons, and for those advanced in the Petitioner's Brief, Southeastern Ohio Oil and Gas Association urges this Court to vacate the opinion of the Sixth Circuit and dismiss the Complaint for lack of jurisdiction; or, in the alternative, to the extent that the Court addresses the merits, it should reverse the Sixth Circuit's decision and declare the Wayne Forest Plan lawful and valid.

Respectfully submitted,

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AMICUS CURIAE

BRIEF